



State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES
6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-3503 FAX (603) 271-2867



American Excavating Corporation
34 Walnut Hill Road
Derry, NH 03038

Re: 232 North Broadway
Salem, NH

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
AND HEARING
No. AF 01-038**

May 16, 2001

I. Introduction

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division (the Division) to American Excavating Corporation, pursuant to RSA 482-A and Env-C 614. The Division is proposing that fines totaling \$2,000 be imposed against American Excavating Corporation for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. Parties

1. The Department of Environmental Services, Water Division, is an administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH.
2. American Excavating Corporation ("American Excavating") is a NH Corporation having a mailing address of 34 Walnut Hill Road, Derry, NH 03038.

III. Summary of Facts and Law Supporting Claims

1. Pursuant to RSA 482-A, the Department of Environmental Services (DES) regulates dredging, filling, and construction in wetlands. Pursuant to RSA 482-A:11, I, the Commissioner of DES has adopted Wt 100 *et seq.* to implement this program.
2. Pursuant to RSA 482-A:13 and RSA 482-A:14, III, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of the statute, of rules adopted pursuant to the statute, or of any order or permit issued under the statute. Pursuant to RSA 482-A:11, I, the Commissioner has adopted Env-C 614 to establish the schedule of fines for such violations.
3. Nationwide Health Properties NH, Inc. is the owner of property located at 232 North Broadway, more particularly identified on Town of Salem tax maps as Tax Map 72, Lot 3283 (the "Property").
4. The Property is being developed as a self storage facility by Burlington Self Storage of Burlington, Massachusetts. The contractor for the development project is Fulcrum Associates ("Fulcrum"). Fulcrum subcontracted the site work for the development project to American Excavating Company ("American Excavating").
5. In November of 1999, Gove Environmental Services, Inc. ("Gove") prepared a wetlands

delineation of the Property. The Gove wetlands delineation was incorporated into a site development plan prepared by MHF Design Consultants, Inc. ("MHF") dated October 16, 2000. MHF identified the wetlands delineated by Gove as "Wetland A", "Wetland B" and "Wetland C."

6. Based on information provided to DES by Steven Dubois of Fulcrum, Fulcrum provided American Excavating with a copy of the October 16, 2000 site plans before American Excavating began the site work. The plans provided to American Excavating show the size and location of wetlands delineated by Gove. The plans show that no site work was to be conducted within any of the delineated wetlands.

7. On December 15, 2000, DES personnel conducted an inspection of the Property to determine compliance with RSA 482-A and NH Code of Admin. Rules Wt 100-700. A Gove representative was present during the field inspection. During the inspection, the following deficiency was documented:

a. Approximately 1,500 square feet of Wetland A had been filled during site development activities.

8. Based upon information provided to DES by Fulcrum and Burlington Self Storage, DES concluded that American Excavating placed the fill in Wetland A during site work activities. On February 20, 2001, Tom Lannan of American Excavating confirmed this finding during a telephone conversation with DES personnel.

9. DES has no record of a permit issued for the fill observed during the field inspection.

10. RSA 482-A:3, I states in part that no person shall excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from [DES].

11. RSA 482-A:14, III states in part that "failure, neglect or refusal to comply with this chapter or rules adopted under this chapter, or an order or condition of a permit issued under this chapter, and the misrepresentation by any person of a material fact made in connection with any activities regulated or prohibited by this chapter shall be deemed violations of this chapter."

12. Env-C 614.05 (b)(2) defines a Class IV Violation in part as "[u]nauthorized fill that involves...(2) Any fill or building construction in wetlands for lot development."

13. Env-C 614.05 authorizes a fine of \$2,000 for Class IV Violations of wetlands rules.

IV. Violations Alleged

1. American Excavating has violated RSA 482-A:3, I by placing approximately 1,500 square feet of fill in a wetland for lot development.

V. Proposed Administrative Fines

1. For the violation identified in IV.1, above, Env-C 614.05(b)(2) specifies a fine of \$2,000.

The total fine being sought is \$2,000.

VI. Hearing, Required Response

You have the right to a hearing to contest the Division's allegations before the fine is imposed. A hearing on this matter has been scheduled for **Monday, July 30, 2001 at 1:00 p.m. in Room C-110** of the DES offices at **6 Hazen Drive** in Concord, NH. **Pursuant to Env-C 601.06, you are required to respond to this notice.** Please respond **no later than June 29, 2001**, using the enclosed colored form as follows:

1. If American Excavating plans to attend the hearing, please have an authorized representative sign the appearance (upper portion) and return it to James Ballentine, DES Enforcement Paralegal, as noted on the form.
2. If American Excavating chooses to waive the hearing and pay the proposed fine, please have the authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to Mr. Ballentine.
3. If American Excavating wishes to discuss the possibility of settling the case, please have the authorized representative sign the appearance and return it to Mr. Ballentine **and** call Mr. Ballentine to indicate American Excavating's interest in settling.

American Excavating is not required to be represented by an attorney. If American Excavating chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

If American Excavating wishes to have a hearing but is unable to attend as scheduled, American Excavating must notify Mr. Ballentine at least one week in advance of the hearing and request that the hearing be rescheduled. If American Excavating fails to notify Mr. Ballentine in advance and does not have a representative attend the hearing, the hearing will be conducted in American Excavating's absence in accordance with Env-C 204.09.

VII. Determination of Liability for Administrative Fines

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that American Excavating committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that American Excavating committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

- * Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that American Excavating proves, by a preponderance of the evidence,** applies in this case:
 1. The violation was a one-time or non-continuing violation, **and** American Excavating did

not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** American Excavating did not benefit financially, whether directly or indirectly, from the violation.


2. At the time the violation was committed, American Excavating was making a good faith effort to comply with the requirement that was violated.
3. American Excavating has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to American Excavating's case which was not known to the Division at the time the fine was proposed.

*******IMPORTANT NOTICE*******

The hearing that has been scheduled is a formal hearing. The hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that **American Excavating** committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is American Excavating's opportunity to present testimony and evidence that American Excavating did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If American Excavating has any evidence, such as photographs, business records or other documents, that **American Excavating** believes show that **American Excavating** did not commit the violation(s) or that otherwise support **American Excavating's** position, **American Excavating** should bring the evidence to the hearing. **American Excavating** may also bring witnesses (other people) to the hearing to testify on **American Excavating's** behalf.

If American Excavating wishes to have an informal meeting to discuss the issues, American Excavating must contact Mr. Ballentine at (603) 271-6072 to request a prehearing conference.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.state.nh.us.des). If American Excavating has any questions about this matter, please contact James Ballentine, DES Enforcement Paralegal, at (603) 271-6072.

COPY
for 
Harry T. Stewart, P.E., Director
Water Division

Enclosure (*NHDES Fact Sheet #CO-2000*)

cc: Gretchen Rule, DES Enforcement Coordinator
Susan Alexant, DES Hearings and Rules Attorney
Marjory Swope, NHACC
Michael Walls, DOJ/EPB
Salem Conservation Commission
Salem Board of Selectmen
Nationwide Health Properties NH, Inc.
Chris Cappozzoli, Burlington Self Storage
James Gove, Gove Environmental
Steve Dubois, Fulcrum Associates
Richard W. Head, DES (File #00-2605)

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APPEARANCE

____ On behalf of American Excavating I will attend the hearing scheduled for **Monday, July 30, 2001** at **1:00 p.m.** in **Room C-110** of the DES offices at **6 Hazen Drive** in Concord, NH.

Signature

Date

Name (please print or type): _____

Title: _____

WAIVER OF HEARING

____ I certify that on behalf of American Excavating I understand my right to a hearing regarding the imposition of the proposed administrative fine and that as an authorized representative of American Excavating, I hereby waive those rights. The fine payment in the amount of \$2,000 paid to Treasurer, State of New Hampshire is enclosed.*

** If any portion of the payment is made by a check, draft, or money order which is returned or dishonored due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*

Signature

Date

Name (please print or type): _____

Title: _____

RETURN THIS PAGE ONLY TO:

James Ballentine, DES Enforcement Paralegal
Department of Environmental Services
6 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095